For the present case the court may be disposed to take into consideration the mitigating factors namely the plaintiff's own conduct in the matter. Speaking of conduct as mitigating factor I refer to *Duncan & Neill* on Defamation of page 140 under the heading: THE BEHAVIOUR OF THE PLAINTIFF TOWARDS THE DEFENDANT AND IN THE ACTION as follows —

"In all such cases it must be appropriate to say with Lord Esher MR in *Preed* v. *Graham*:(6) '... in actions of libel... the jury in assessing damages are entitled to look at the whole conduct of the defendant' (I would personally add 'and of the plaintiff') 'from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial."

In the circumstances of the case and in the light of the authorities, it is my considered judgment that a fair and reasonable compensation should be in the region of $15,000 for full liability. This sum must, however, be reduced for reason of the plaintiff's own behaviour in the matter. The court, therefore, enters judgment for the plaintiff against the 3rd defendant in the sum of $9,000 by way of damages.

As regards costs I make a consent order to the effect that the plaintiff is to be awarded one third of the total. The court awards no costs to the defendants.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Shook Lin & Bok.*

WAN NORSIAH BINTI WAN ABDULLAH v. CHE HARUN BIN CHE DAUD

[O.C.J. (Mohamed Zahir J.) March 28, 1979]
[Kota Bharu — Civil Suit No. 12 of 1976]

Tort — Negligence — Road accident — Damages — Injured child discharged from hospital against medical advice — Bomoh treatment — Whether child should be penalised.

Damages — Personal injuries — Leg — Right femur — 1" shortening.

In this case on the facts the learned trial judge found that the defendant was wholly to be blamed for the accident. The plaintiff, who was a minor, was admitted to hospital but she was discharged from the hospital against medical advice and as a result suffered 1" shortening of her right lower limb.

Held: the plaintiff should not be penalised as she being a minor was not in a position to give consent for discharge from the hospital against medical advice. The damages awarded should not be reduced because she was discharged against medical advice.

Cases referred to:-

(1) *Wan Siew Luan* v. *Mohd. Ariffin* [1965] 1 M.L.J. xii.
(2) *Chua Kian Piow* v. *Pang Koh Soon & Anor.* [1965] 1 M.L.J. xii.
(3) *Yeo Kek Leng* v. *Ang Siong Teow* [1964] M.L.J. lviii.
(4) *Ho Ah Teng* v. *Kee Hee Joo* [1964] M.L.J. lviii.
(5) *McAuley* v. *London Transport Executive* (1957) 2 Ll. L. Rep. 500.
(6) *Yachuk* v. *Oliver Blais Co. Ltd.* [1949] A.C. 386.

CIVIL SUIT.

Mahmood bin Adam for the plaintiff.

Datuk H.L. Wrigglesworth for the defendant.

Cur. Adv. Vult.

Mohamed Zahir J.: The plaintiff, a minor, is suing through her next friend for damages arising from a motor accident occurred at Jalan Pengkalan Chepa on July 25, 1974.

The plaintiff in her statement of claim alleged that on that day she was standing on the side-table of the road near a bus stop when the defendant driving his car negligently knocked her down.

The defendant in his defence on the other hand pleaded that the accident was caused by the plaintiff while crossing or attempting to cross to the other side of the road without ascertaining or ensuring that it was safe to do so.

In her evidence the plaintiff alleged that on that fateful day she was waiting for a bus in order to go to school at Sekolah Rendah Kebangsaan Islah which is near the Court House here. She was with a number of friends and Norhayati binti Ibrahim (PW2) was one of them. The plaintiff gave evidence as to the accident in this manner:

"When the bus coming from the direction of Pengkalan Chepa appeared we tried to stop it but it did not stop. When the bus which failed to stop passed me, I turned my head and stared at the bus. While I was staring at the bus, I was knocked down and I guess by a car and I became unconscious. The car I guess came from the direction of Pengkalan Chepa. At the time when I was knocked down, I was standing on the side-table of the road."

She admitted that her house was on the other side of the road and she had to cross the road in order to go to the bus stop and to the place where she alleged she was knocked down.

PW2, Norhayati, the friend who was with her at the time of the accident, explained as to how the defendant's car went onto the grass verge and knocked down the plaintiff. She stated that the defendant's car, on passing another car, swerved to the edge of the road and knocked down the plaintiff. She said she saw the swerving.

PW3 who was at the material time cycling in order to go back to Kota Bharu stated he saw the two girls waiting for a bus. He also testified that the car that knocked down the plaintiff was trying to avoid another car coming from the opposite direction. The plaintiff was knocked down as she was standing on the edge of the tarred road.

The defendant in his evidence stated he was driving his car from Pengkalan Chepa towards Kota Bharu with one male Chinese, Teh Kok Keong (DW2), who was seated on his left. He saw many children near the school fence. A lorry was coming from the opposite direction. He slowed down. Then a girl crossed the road from behind the lorry from his right to the left and he saw her only after he passed the lorry and she was then already at the centre line, running. She was 14 feet away from him. He applied on the brakes and swerved to the left. He failed to avoid her and the off-side front bumper hit her. She was flung over the bonnet of the car and fell on his right rear side of the car.

DW2, the said Teh Kok Keong, testified that he saw a girl dash out from the right side of the road to the left. This is how he gave the evidence-in-chief:

"I saw the girl cross the road all the way from the right to the left. Yes, I saw her come from the right side of the road."

Later he stated:

"When I first saw the plaintiff she was already in the middle of the road. At first I did see the plaintiff standing at the edge of the tarred road."

He then went on to describe as to how the plaintiff was knocked down on the defendant's side of the road as the result of her sudden crossing the road.

Thus, the evidence of both sides are conflicting. The sketch plan did not assist either party. The Investigating Officer was not called and neither was the Police Officer who prepared the sketch plan. But the sketch plan was admitted by both parties in the Agreed Bundle of Documents except the marking "A", the place where the defendant was alleged to have shown to the Police Officer to be the place where the plaintiff was knocked down. But the defendant in his evidence failed to show on the sketch plan where the impact was. So the sketch plan was of no significance. No photographs as to the scene and the car were produced.

So I have to rely only on the oral testimony and demeanour of both parties and their witnesses as to how the accident occurred.

Let me say at the outset that I was impressed in the way the plaintiff and PW2 gave the evidence. It appears to me that they were truthful and if there was any hesitation on their part, it was hesitation in order to recall something. I do not think they concocted their evidence. Their evidence had the ring of truth. The plaintiff said she was standing at the place where she was knocked down as she was waiting for a bus in order to go to school at 1.05 p.m. Her house was on the other side of the road and there was no reason why she had to cross the road again for the accident to happen in the manner stated by the defence.

I cannot accept the evidence by the defence. I am of the opinion if the defendant first saw the plaintiff about 14 feet away in front of him when she had already passed the centre line, running, as was his evidence, he would not have failed to see her as she was on the white line. In answer to a question by the court, he said, she was about 3 feet away from the centre white line on his side of the road. If this be the case, the defendant could have seen her earlier. The width of the road, according to the sketch plan was 24 feet and according to the defendant, he was driving about 3 feet from his left edge. He was therefore in such a position that he could have seen the plaintiff earlier if his story were true. When asked by the court why he could not see the plaintiff when she was on the centre white line, his answer was at that time he was looking to the left.

I think this is a lame answer. But when asked that the plaintiff would be in his field of vision at 14 feet in front, he replied his view was obstructed by the lorry. This answer could not be true as, if he could see the plaintiff at 3 feet from the centre white line, almost directly in front of him, he must have seen her at the centre white line which was on the same field of vision and there was no evidence that the lorry encroached on to his side of the road. In fact he stated the lorry was being driven about one foot from the centre white line. Again his evidence was that he saw her emerging from the rear of the lorry and this would mean she had not yet crossed the white line. Further he stated he saw her emerging from the rear of the lorry and at that time the lorry had passed him. As he said he saw her at 14 feet away and at that time the lorry had passed him, then it follows that the lorry had passed him at a distance of more than 14 feet from the plaintiff and if it were so, the defendant could have seen the plaintiff even much earlier.

In his Police Report the defendant had failed to mention about the lorry. I am of the opinion if there was indeed such a lorry which caused the obstruction to his view and which accounted for the accident, he would not have failed to mention this in his Police Report when the fact was still fresh in his mind. He did not mention about his witness, DW2, being a passenger and therefore a witness. He, however, stated in his evidence that he mentioned about the lorry in his Police Report although he was reminded that he did not do so.

The evidence of DW2 is still more unconvincing. He has been in Kelantan for 20 years and yet he professed not to know Pengkalan Chepa, Kelantan's only air-port. He studied Chinese and went to a Chinese School in Singapore and he read Chinese newspapers. But he in his evidence-in-chief stated without hesitation that before the defendant gave him a lift in order to go back to Kuala Krai, the defendant wanted to go to Pengkalan Chepa to fetch a worker. Yet, he said he did not know where the air-port was. He said he remembered the name as Pengkalan Chepa because the defendant told him about four years ago.

I would not attach much significance on this part of DW2's evidence had it not been for other unacceptable evidence adduced by him. He could remember in his evidence-in-chief the Arabic name of the school "Maktab Islah" and he gave the explanation by saying that he could see the name of the school about four years ago and it was the first time he saw the name-board of the school.

He also testified that he saw the plaintiff dash out from right to left of the road which the defendant could not see because, according to the defendant, his view was obstructed by the lorry. DW2 was seated on the defendant's left. I think if the defendant's view was obstructed by the lorry, then DW2's view would also be similarly obstructed. But in spite of the fact he testified a number of times he saw the plaintiff cross the road from the right to the left, he at one stage stated that when he first saw the plaintiff she was already in the middle of the road. Later in cross-examination he testified that the lorry had passed when the plaintiff dashed out from right to left.

I cannot accept such evidence. He even testified that when the defendant applied the brake, the car stopped immediately. In re-examination he stated as follows:—

"When I said the defendant's car stopped immediately, it means that the car move a few steps, that is one foot away to the front. Yes, the stopping distance of the car was one foot."

I have a suspicion whether DW2 was in the car at the time of the accident. His name was not mentioned in the Police Report by the defendant although it was alleged by the defendant that they went to the Police Station together. He was so sure in certain aspects and nothing could shake him. He would give explanation which could not in the ordinary course of events be acceptable. For instance, he stated:—

"As the defendant approached the Maktab he was going at 20 m.p.h. This was not my estimate of the speed. I did have a look on the speedometer."

I do not think anyone would look at the speedometer without any cause to do so. He also stated as follows:

"Yes, the plaintiff knocked into the car when it was stationary."

The defendant's counsel submitted that it was impossible for the car to have knocked down the plaintiff as she was standing on the side-table if there was evidence that the car was being driven about 2½ feet from the edge of the road. But that is before the accident and there was evidence by PW2 that the car which knocked down the plaintiff swerved to the edge of the road after passing the other car and knocked down the plaintiff. PW3 also stated that the car that knocked down the girl was trying to avoid another car coming from the opposite direction. PW2 was subject to a rigorous cross-examination by the defence counsel and I think from her reply she was stating the truth. When asked to mark the various positions where the plaintiff and she were before the accident, she did so and the way she did so and the way she testified, did not suggest to me that she was lying.

I would agree with the defence counsel that PW3, from where he was and as he was cycling, could not see the impact. Most probably what he saw was after the impact. But this evidence does not disprove the whole of the plaintiff's side of the story.

As regards the locations of the injuries on the plaintiff and as to whether the plaintiff should pivot or be thrown forward after being knocked, as the defence counsel submitted that the accident could not have occurred in the manner described by the plaintiff, is a matter for speculation. It all, I think, depends on many circumstances as to the manner, position, speed and such other things as to cause the body to behave in any particular manner and which I think is too remote for even my mind to imagine.

The plaintiff's counsel in his submission pointed out that the defendant had not raised the presence of the lorry in his defence. I will not rule as submitted by the plaintiff's counsel that the defendant is precluded from adducing such evidence. He did not raise this point at the trial. But I would say failure to plead the presence of the lorry in his defence, the defendant's later introduction of this evidence would be a suspect. It is something that should be pleaded so as to give a good reason why the defendant had failed to take an avoiding action from knocking down the plaintiff. To avoid liability of at least contributory negligence the defendant should have pleaded the presence of the lorry which obstructed his view of the plaintiff. This he had failed to do. But as I stated earlier he did not even disclose the presence of the lorry in his Police Report which he made soon after the accident. As such I reject his evidence.

In the circumstances, I find in favour of the plaintiff and hold that the defendant is wholly liable for the accident.

As regards the quantum, the plaintiff suffered about 8 abrasions at diverse parts of the body and also swelling over right thigh with abnormal movement, tenderness and deformity. There was a fracture shaft of the right femur and ½" incised wound in the dorsum of right foot. The plaintiff walked with a noticeable limp and she had 1" shortening of the right femur with ½" wasting of the right thigh muscles. X-ray of the right femur showed a well healed right femoral shaft with a 2" overlap of fragments. Her parents refused her medical treatment and on the following day of her admission they took her home for Bomoh treatment. The 1" shortening of her right lower limb is due to her discharge from hospital against medical advice.

In the case of *Wan Siew Lum* v. *Mohd. Ariffin,*[1] a sum of $8,500 was awarded for 1" shortening and in another case on the same page *Chua Kian Piow* v. *Pang Kah Soon & Anor.*[2] where there were other accompanying injuries, the award was $16,000.

In *Yeo Kek Leng* v. *Ang Siong Teow,*[3] the plaintiff was awarded $7,000. Also in *Ho Ah Teng* v. *Kee Hee Joo*[4] the award was $7,500 for 1" shortening. Considering all the injuries of the plaintiff and the present value of money, I am of the opinion, the award should be $10,000.

Now I come to the question whether this sum of $10,000 should be reduced because she was discharged from hospital against medical advice. It must be borne in mind that the plaintiff was a minor at the time of the accident and she is still a minor before me. Can I penalize her for something done by her parents? I am of the opinion, I should not do so. She being a minor was not in a position to give consent for discharge from the hospital against medical advice and obtain Bomoh treatment. But at the same time should the defendant be penalised for the idiocracy of the plaintiff's parents? I think the court has no choice but to do so and the defendant may not be without remedy for he may obtain indemnity against the persons who had refused the plaintiff minor proper medical treatment. I think this is in line with the principle that if a person caused grievous hurt to another, he would nevertheless be liable for the death of the injured person notwithstanding that person had earlier refused medical treatment which might have saved his life. The position would be similar in criminal cases. Where an adult discharges himself against medical advice and his injuries became more serious, then the normal thing the court would do is to reduce the quantum of damages as has been done by our courts (see *McAuley* v. *London Transport Executive*[5]). In the case of an infant plaintiff the court will not do so as he is not responsible for the act.

In *Yachuk* v. *Oliver Blais Co. Ltd.,*[5] a boy of nine made a torch with petrol and as a result he was burnt. The defendant whose employee sold the petrol to the infant plaintiff was sued. The trial judge held there was contributory negligence on the part of the boy but this was reversed by the Privy Council on

the ground that the boy did not know that petrol was likely to burst into flame if heat were brought near it.

Clerk and Lindsell on Torts, 13th Edition at page 585 has this to say:

"From the cases it seems to be that in considering whether a child has taken reasonable care for its own safety regard must be had to the age of the child, the circumstances of the case and the knowledge by the particular child of the perils to which the defendant's negligence has exposed him. There is no age below which, as a matter of law, it can be said that a child cannot be guilty of contributory negligence."

In our instant case it would appear that it was most improbable that the plaintiff had knowledge of the danger of "bomoh" treatment.

In the circumstances, I enter judgment for the plaintiff in the sum of $10,000 general damages and $95 special damages and costs. Interest at the rate of 6% on general damages and 3% on special damages with effect from date of service of writ. I further order that the sum of $10,000 be paid to the Public Trustee during the infancy of the plaintiff with liberty to apply.

Claim allowed.

Solicitors: *Mahmood Adam & Co.; Wrigglesworth & Co.*

HALIMAH BINTI ABDULLAH v. TENGKU MARIAH BINTI SULTAN SULAIMAN

[O.C.J. (Mohamed Zahir J.) April 3, 1979]
[Kuala Trengganu — Civil Suit No. 60 of 1978]

Practice and Procedure — Limitation — Claim for recovery of land — Acknowledgement — Time runs from date of acknowledgement — Limitation Ordinance, 1953, s. 26(1).

In this case the plaintiff alleged that by a "Jual Beli Sementera" dated June 28, 1951, the defendant undertook to execute the transfer of the land when she obtained it from the estate of her father, the late Sultan Sulaiman. The previous solicitors of the defendant had also written on January 14, 1978 that the defendant was prepared to sign a transfer of the land into the name of the plaintiff. The plaintiff claimed the land and the defence was limitation.

Held: the letter of the solicitors for the defendants was sufficient acknowledgment for all intents and purposes and therefore the plaintiff's claim was not statute-barred.

Case referred to:-

(1) *Wee Tiang Tong* v. *Ong Chong Hooi & Anor.* [1978] 2 M.L.J. 54.

CIVIL SUIT.

Wan Abdul Muttalib for the plaintiff.

Mrs. Cecilia Fernandez for the defendant.

Cur. Adv. Vult.

Mohamed Zahir J.: This case came up before me for hearing on February 4, 1979 and before its commencement, counsel for the defendant, Mrs. Fernandez, asked for adjournment as her client was sick in Penang. I then asked her whether her defence was based solely on the plaintiff's claim being statute-barred. Upon her replying in the affirmative, I asked both counsel whether they would agree to argue on this point alone. They both agreed.

Mrs. Fernandez submitted that the plaintiff waited for 26 years before instituting the suit and submitted that it is statute-barred and quoted the case of *Wee Tiang Tang* v. *Ong Chong Hooi & Anor.*[1] She argued that limitation to the plaintiff's claim would operate in spite of the previous defendant's solicitors admitting the sale and having notified the plaintiff's solicitors that the defendant was prepared to sign any document of transfer.

Encik Muttalib, counsel for the plaintiff, produced the letter of "Jual Beli Sementara" dated June 28, 1951 where the defendant undertook to execute the transfer when she obtained the land from the estate of her father, the late Sultan Sulaiman. He also produced a letter from the previous solicitors of the defendant, Nik Hussain, Ibrahim & Abdullah, dated January 14, 1978 where it was stated that the defendant was prepared to sign a transfer of the land into the name of the plaintiff.

I do not intend for the purpose of argument before me to include the fact that the plaintiff, as submitted by her counsel, is in possession of the land at all material times and that she had two or three houses on the land, as this should be properly adduced through a witness from the witness box. Further, this point is not pleaded in the statement of claim and there is no admission.

Vide paragraph 4 of the statement of claim, the plaintiff pleaded that on June 28, 1951, the defendant sold the said land to the plaintiff at the price of $450 and to this effect the defendant executed a deed of sale. *Vide* paragraph 4 of the defence, the defendant denied the facts alleged in paragraph 4 of the statement of claim but strangely enough admitted having entered into an agreement to sell the said land after the said land was registered in the defendant's name in consideration thereof accepted $450 from the plaintiff. Paragraph 4 of the defence virtually admitted paragraph 4 of the statement of claim.

Vide paragraph 5 of the statement of claim, the plaintiff pleaded that the defendant agreed to execute a valid transfer of the said land to the plaintiff immediately after the said land was registered in her name. There was no denial of this paragraph in the defence and in fact the defence did not refer to paragraph 5 of the statement of claim at all and as such and in view of the admission in paragraph 4, I take it that paragraph 5 of the statement of claim was admitted.

Paragraphs 9 and 10 of the statement of claim allege that the plaintiff wrote to the defendant requesting for an execution of a valid transfer and that the allegation that there was a reply from the previous solicitors for the defendant admitting that the defendant was willing to execute such a transfer and also the plaintiff's solicitors prepared such form of transfer and forwarded the same to the defendant's previous solicitors for the defendant to sign and which the defendant had failed to do. The defendant did not refer to these allegations directly but *vide* paragraph 6 of her defence she pleaded in the following manner:

"In answer to paragraphs 8-13 of the Statement of Claim the defendant contends that the plaintiff's cause of action, if any, which is denied, is time-barred...."

Again, there was no specific denial by the defendant of her willingness to execute such transfer and I take it therefore that these facts are also admitted (see Order 19 rule 13 of Rules of the Supreme Court).